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CITATIONS

490-158—72——1

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 70-279

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLIANTS

v.

FLORIDA EAST COAST RAILWAY COMPANY AND SEABOARD COAST LINE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

1. In *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–758, this Court held that Sections 556 and 557 of the Administrative Procedure Act, 5 U.S.C. 556, 557, are inapplicable to the promulgation of car service rules under Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a). FEC attempts to distinguish *Allegheny-Ludlum* by suggesting that, while the Commission may have been engaged in legislative rulemaking in promulgating the car service rules under review in that case, it was acting in a quasi-judicial capacity in prescribing incentive per diem rules here and that therefore *Alle-*

gheny-Ludlum is not controlling (FEC Br. 11–14, 21–24). The short answer to this contention is that in both instances the Commission was engaged in rulemaking and Section 1(14)(a), under which both sets of rules were promulgated, does not require one type of hearing when car service rules are under consideration and a different type of hearing when car-hire rules are under consideration. The first part of Section 1(14)(a), originally enacted as part of the Esch Car Service Act of 1917, 40 Stat. 101, provides that the Commission may "after hearing * * * establish reasonable rules, regulations, and practices with respect to car service * * * including the compensation to be paid" for the use of any freight car not owned by the carrier using it.[1] The 1966 amendment, 80 Stat. 168, merely appended to this basic rulemaking power the authority to determine "[i]n fixing such compensation" whether it should be increased by an incentive element; the 1966 amendment did not alter the "hearing" requirement contained in the beginning of Section 1(14)(a).

Seaboard, in its attempt to distinguish *Allegheny-Ludlum,* contends (Br. 11–16) that the 1966 amendment did indeed alter the "hearing" requirement since the amendment requires the Commission, prior to establishing incentive per diem rules, to take certain

[1] This Court has recognized that the establishment of car-hire rates under Section 1(14)(a) is an exercise of "the Commission's recognized rule-making power". *Boston & Maine R.* v. *United States*, 358 U.S. 68, 70. And there is no doubt that the promulgation of per diem rules comes within the definition of rulemaking in the Administrative Procedure Act. See 5 U.S.C. 551 (4) and (5).

factors into consideration and "on the basis of such consideration" to make certain determinations. 49 U.S.C. 1(14)(a). But the requirement that the Commission act only after making certain determinations on the basis of several considerations is simply a requirement that the Commission make certain legislative findings. Nothing in the statute suggests that these determinations must be made "on the record" of the hearing required by the first part of Section 1(14)(a). Under Section 553(c) of the Administrative Procedure Act, only where rules must be made "on the record" after an agency hearing, do Sections 556 and 557 of the Act become applicable. Thus, Sections 556 and 557 are no more applicable to incentive per diem rulemaking proceedings than they are to the car service rulemaking proceedings that were under review in *Allegheny-Ludlum*.

2. Assuming that Section 556 of the Administrative Procedure Act does apply here, Seaboard argues (Br. 37-38) that it is not necessary to show "prejudice" to be entitled to an oral hearing under that Section since the first part of Section 556(d) confers an absolute right to "such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d). The structure of Section 556(d) makes clear, however, that the rights conferred by the first part of the Section are limited by the Section's last sentence, authorizing agencies to dispense with oral hearings "when a party will not be prejudiced thereby."

3. In response to our argument that Commission personnel involved in the decisional process are not

subject to cross-examination (Gov't Br. 25–26), FEC asserts that in requesting an oral hearing it was merely seeking to compel testimony by Commission employees who had testified in prior Commission proceedings and are "field agents, data assemblers, and car supply directors" (FEC Br. 27–28). FEC contends (Br. 28) that these employees prepared the statistical studies and field audits on which the Commission relied in issuing its interim report. While Commission "field agents" did prepare field audits referred to by the Commission (see, *e.g.*, J.S. App. 65a–66a), no "data assemblers" or "car supply directors" prepared the statistical analyses on which the Commission relied. The Commission personnel who assisted the Commission in analyzing the data from the 1968 freight car study were all from the Commission's central staff[2] and were engaged in the decisional process.

With respect to the field agents, FEC asserts (Br. 31–33) the need to cross-examine them to test their finding in conducting field audits in connection with the 1968 study that the car orders reported by the railroads were not significantly distorted by overordering by shippers. In only 3.5 percent of the audits did the agents find any affirmative evidence of overordering (J.S. App. 65a–66a). Cross-examination to probe the methodology of the agents in conducting the audits, however, would be of very limited utility, at best, since

[2] The only exception was the Commission's Bureau of Enforcement which was a party to the proceeding before the Commission and submitted its comments to the Commission with service on all the parties (see App. 187, 198).

the 1968 study itself confirmed the absence of significant overordering. The study revealed that the railroads actually placed plain boxcars against 98.7 percent of the orders for such cars reported in the study (J.S. App. 66a).[3]

In more general terms, FEC asserts (Br. 33–36) that it needed to cross-examine responsible staff members of the Commission to show that they might disagree with some of the Commission's conclusions. Seaboard asserts a similar need to test the "opinions of ICC personnel" and whatever "Commission thinking" led to the promulgation of the incentive per diem rules (Br. 34–35). The Commission was not obligated, however, to make available for cross-examination the staff assistants who aided in the decisional process or other employees who might disagree with the conclusions of the Commission. Both the statistical analyses on which the Commission relied and the underlying data were available to the carriers and they were given the opportunity to present their own critical analyses in writing. And whether the opinions of the members of the Commission's staff were in conformity with

[3] The large amount of overordering of cars reflected in the prior incentive case of 1967 (*Incentive Per Diem Charges*, 332 I.C.C. 11), to which FEC refers (Br. 32–33), led the Commission to undertake the wholly fresh study of freight car supply and demand in 1968 before adopting any incentive plan (see J.S. App. 52a–53a). The excess orders to which FEC refers in Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 305–306, were part of the same data collected by the Association of American Railroads which the Commission here rejected in 1967 and replaced in 1968 (compare 335 I.C.C. at 278–281, 284, and J.S. App. 52a).

the Commission's decision is of little relevance here, since it is the Commission, and not its employees, in which Congress has vested the final responsibility for resolving the specialized questions involved here. Finally, in a case of this nature, a carrier is not entitled to cross-examine Commissioners to determine whether they truly support a reported decision;[4] similarly, no party is entitled to cross-examine a Commissioner's assistant to determine whether his opinions agreed with the views of his superior. See *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 790 (S.D. Tex.), affirmed *sub nom. Herrin Transportation Co.* v. *United States*, 366 U.S. 419.

3. Seaboard argues (Br. 36) that the Commission "overlooked" shipper and carrier interests in the Southeast and that this omission would have been cured by an oral hearing. This argument, however, is simply a variation of Seaboard's primary contention that the incentive charges should have applied to its specially equipped boxcars, as well as to the general service, unequipped boxcars (Br. 33–36, 43–46, 49–52). The Commission gave careful consideration to Seaboard's argument, stating that there already were sufficient incentives for Seaboard and other such railroads to purchase specially equipped cars and that those carriers were sufficiently compensated for the operation of the more modern and more expensive

[4] Since the Commission issued detailed reports and made legislative findings in accordance with the requirements of Section 1(14)(a) of the Interstate Commerce Act, this case does not fall within the rule that administrative officials acting without making findings may be required to testify to explain their acts. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420.

cars in the larger per diem payments resulting from the application of normal, compensatory per diem charges (J.S. App. 91a–92a).

4. The Commission adequately considered each of the points FEC briefly raised in its two and one-half page request for an oral hearing, after finding that it had considered all the facts and statements of the parties and no party had been prejudiced by the absence of an oral hearing (J.S. App. 87a–88a). For example, when FEC joined Penn Central in attacking the Commission's concept of "deficiencies" as a failure to supply cars ordered by shippers,[5] the Commission responded that the carriers' failures to meet car orders could not be excused by their operating insufficient train schedules, and that such delays in filling orders were "properly considered * * * in determining whether the availability of cars was sufficient to meet the shippers' demands for service" (J.S. App. 89a).

5. FEC asserts (Br. 36–38) that in the event this Court reverses the judgment of the district court, the case should be remanded to the district court for the resolution of issues not considered by the district court in the first instance (see J.S. App. 5a).[6] Sea-

[5] FEC merely urged before the Commission that deficiencies may not be affected by the supply of cars (J.S. App. 47a), which it now equates with Penn Central's argument that deficiencies resulted from insufficient train service schedules rather than a lack of cars (FEC Br. 31).

[6] FEC's contention (Br. 37–38) that it is entitled to a *de novo* trial before the district court is plainly insubstantial. As this Court held in *United States* v. *Allegheny-Ludlum*, *supra*, 406 U.S. at 748–749, the scope of judicial review of Commission rulemaking orders promulgated under Section 1(14)(a) of the Interstate Commerce Act is sharply limited. See *United States* v. *Jones*, 336 U.S. 641, 673.

board, on the other hand, discusses those issues in its brief (Br. 41–55) and urges the Court to consider them as a basis for affirmance even if the Court concludes that no oral hearings were required. In our view, these remaining issues—which essentially are whether the Commission's order is "reasonable" as required by Section 1(14)(a), whether the order contains appropriate findings and is based on substantial evidence, and whether FEC should have been exempted from the incentive rules—are not substantial; accordingly we urge the Court to affirm the Commission's order without further proceedings before the district court.

Seaboard contends that the Commission's order is not reasonable and that certain factors required to be taken into account by Section 1(14)(a) were not considered (Br. 43–46). Seaboard's contention that the rules are not reasonable is based primarily on its assertion that it was unduly burdensome to Seaboard to prescribe incentive per diem rules for plain boxcars alone. As we have noted (pp. 6–7, *supra*), the Commission considered and rejected this contention. Seaboard's argument that the national car supply was not considered is based on the allegation that the Commission studied only two zones of the country (Br. 45). In fact, the 1968 study was based on reports from railroads in each of six geographic areas or zones covering the continental United States (J.S. App. 62a), and the Commission specifically found car shortages "throughout a large part of the country" (J.S. App. 88a).

Seaboard also objects that the Commission failed to find categorically that the incentive rules will improve the supply and utilization of cars (Br. 48–49) and contends that the Commission acted on an insufficient factual base in establishing the level of incentive payments (Br. 53–55). But obviously the Commission could not predict with certainty the outcome of its order or whether slightly higher or slightly lower incentive rates would be preferable. It is enough that, in the Commission's expert judgment based on prolonged study, the rules were reasonably designed to improve the supply and utilization of freight cars; the Commission recognized that "as we gain experience under the incentive per diem charges adopted herein, modification or expansion of the rules and charges may well be required" (J.S. App. 91a).

FEC argues (Br. 4–5) that the incentive charges would not improve car utilization or efficiency on its lines, citing the statements of its officials made before the Commission. The Commission considered FEC's contention in depth. It found that FEC, although a terminating road with no interest in direct purchases of additional equipment, "can be expected to contribute to improved car utilization, given the incentive to do so" (J.S. App. 100a).[7] The Commission added that FEC in any event has a substantial interest in the maintenance of a national car supply,

[7] Several "car distribution directions" entered by the staff of the Commission in 1969 and 1970 to require FEC to return excess cars on its line to other railroads in need of them were made a part of the record in the district court at the hearing on the motion for a temporary restraining order.

albeit "indirectly by better enabling the creditor roads to augment the car fleet"; FEC "should in fairness bear a portion of the cost of these additional risks" borne by the creditor roads beyond that included in the basic per diem charges when the creditor roads undertake to buy cars beyond their own normal requirements to alleviate a national shortage (*ibid.*). The Commission is empowered "to restore incentive to the various roads to augment their supply of freight cars, even at the temporary expense of optimum utilization of the existing fleet of freight cars." *United States* v. *Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 754. It follows that the Commission is empowered to adopt the rules here in issue which serve not only to augment the fleet, but to increase utilization of the existing fleet as well.

6. Finally, *Seaboard* argues (Br. 57–59) that it should not be ordered to make restitution in the event the Commission's order is upheld by this Court, since there has been no "wrong" as a result of its obtaining a stay delaying the effective date of the incentive per diem rules against it. It cannot be denied, however, that but for the stay, FEC and Seaboard would have paid other carriers incentive charges for the use of the other carriers' plain boxcars during certain months of the year. In the event the government ultimately prevails in this case, FEC and Seaboard should be required to make good the payments they would have made but for the stay, offset, of course, by the incentive monies they would have collected

from other carriers using FEC's and Seaboard's cars.[8]

CONCLUSION

For the foregoing reasons and for the reasons stated in our main brief, the judgment of the district court should be reversed and restitution should be required of FEC and Seaboard.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
FRITZ R. KAHN,
General Counsel,
LEONARD S. GOODMAN,
Associate General Counsel,
Interstate Commerce Commission.

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[8] If restitution is ordered, the customary method of settling balances of per diem accounts will be used (see J.S. App. 113a).

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